United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-406–12 OF 2015
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
29 MARCH 2017

Land Law — Acquisition of land — Application for certiorari to quash decision to acquire land — Respondents sought to compulsorily acquire appellant's 26-acre land under the Land Acquisition Act 1960 ('the LAA') for declared purpose of building a mosque — Respondents failed to publish notice of acquisition in Form A in government gazette as mandatorily required by s 4(1) of the LAA — Mandatory provisions of ss 23 and 66 of the LAA and Director-General of Lands and Mines Circular No 27/2009 requiring endorsement of memorial of acquisition on land's title also not complied with to vest land in state authority — Whether acquisition rendered illegal by failure to follow mandatory statutory provisions — Whether respondents acted mala fide and against legitimate expectations of appellant — Whether there was change in purpose for which land acquired as different from that declared in government gazette — Whether High Court failed to judicially appreciate evidence and law applicable and wrongly dismissed application for judicial review

The appellant owned a 26-acre piece of land ('the land') on which it intended to develop a housing estate. It set aside about an acre of the land for the expansion of an existing mosque on the site and made provisions for more land to be used for that purpose if it was required. The respondents, however, took steps to compulsorily acquire the entire 26 acres of land under the Land Acquisition Act 1960 ('the LAA 1960') for the declared purpose as published in the government *gazette* of building a mosque. The appellant obtained leave of the High Court to apply for judicial review for an order to quash the decision to acquire the land, contending that the entire acquisition exercise was procedurally wrong and illegal. The appellant pointed out that the respondents had not complied with the mandatory provisions of the LAA 1960 with regard to the issuance of Forms A and K; that there was a change in the purpose for which the land was acquired as different from that declared in the government *gazette* notification; and that the entire acquisition exercise was mala fide and breached the appellant's legitimate expectation that the respondents would act in accordance with the discretionary powers or duties that were lawfully conferred upon them. With regard to the preliminary notice of acquisition in Form A that was mandatorily required by s 4(1) of the LAA 1960 to be published in the government *gazette*, the appellant pointed out that Form A was never issued at all by the respondent concerned, let alone published in the

gazette. With regard to Form K, the appellant submitted that the mere issuance of Form K without the required endorsement of the memorial of the acquisition on the document of title to the land under ss 23 and 66 of the LAA 1960 was insufficient to vest the land in the state authority and therefore the land remained registered in the name of the landowner. The High Court dismissed the judicial review application resulting in the instant appeal against the decision. At the appeal hearing, the respondents who were represented by the Assistant Legal Advisor of Selangor revisited the argument they had made before the High Court that leave to file the judicial review application should not have been granted as the leave application was filed out of time.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) The appellant had shown that this was a fit and proper case for the appellate court to put right what had been proven to be a grave wrong occasioned to the appellant. The judicial commissioner ('the JC') had failed to sufficiently appreciate the evidence that was before her which led her to come to a plainly wrong decision. She had erred in appreciating the true implications of Forms A and K of the LAA 1960 as well as the other issues raised by the appellant (see para 45).

(2) The issuance of Form A was a mandatory requirement under s 4(1) of the LAA 1960. It could be issued at a later date, but it must be issued in a land acquisition exercise under the LAA 1960. Contrary to the evidence that was before her, the JC made a finding that both Forms A and D were issued and were duly published in the government *gazette* when, in fact, Form A was never issued at all and this was admitted to by the second respondent in his affidavit. As Form A was admittedly not issued to the appellant, it could not possibly and factually have been published as required in the government *gazette*. The respondents could not produce the relevant Form A despite being challenged to do so by the appellant. As there was no issuance at all of the Form A and therefore no publication of the same in the *gazette*, there was non-compliance with a mandatory legal requirement by the respondents, which rendered the acquisition of the appellant's land illegal (see paras 14, 16 & 20).

(3) The court agreed with the appellant's contention that the mere issuance of Form K without the required endorsement of the memorial of the acquisition on the document of title pursuant to ss 23 and 66 of the LAA 1960 was insufficient to vest the land in the state authority. Relying on the Court of Appeal's decision in *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 the JC took the view that the land vested in the state authority the moment Form K was issued. This court could not follow the decision in *Ishmael Lim* because the panel there did not consider two crucial provisions of statutory origin in coming to its decision, namely: (a) the Surat Pekeliling

Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 27/2009 ('the 27/2009 Circular'); and (b) s 66 of the LAA 1960. Section 66 mandatorily required the memorial to be made to vest the subject land in the state authority whilst the 27/2009 Circular, issued in exercise of the statutory provisions of s 8(e) of the National Land Code to give effect to s 66 of the LAA 1960, was not merely an administrative circular but a subsidiary legislation as defined by s 3 of the Interpretation Act 1948. The circular reaffirmed the position that before an endorsement or memorial of the acquisition pursuant to Form K was made on the document of title of the land to be acquired, the land shall not vest in the state authority. The nett effect of the failure to observe these statutory requirements in the instant case was that the land had not vested in the state authority and the appellant was still competent to stake and pursue its challenge against the purported acquisition of the land (see paras 22, 25 & 35).

(4) The respondents' affidavit in reply to the assertions made by the appellant in its affidavit was a curious mix of bare denials, contradictions of themselves and each other, blaming each other or just plain outright failure and/or refusal to answer the points raised. The intentional evasive conduct on the part of the respondents in failing to answer with required candour in the performance of their public duty constituted mala fide in the sense it was done so as to deny the appellant of its rightful property and that was a ground to strike down the decision under the broad category of procedural impropriety (see para 38).

(5) The respondents admitted in their affidavits that the purpose of the acquisition as adverted in the signboard erected on the site was different from that declared in the government *gazette*. They further admitted that the purpose declared in the *gazette* was different from the intended use of the land which would include a cemetery and other buildings, none of which were properly declared in the government *gazette*. The court agreed with the appellant that there was a change in the purpose for which the land was acquired and it was not specifically only for the purpose of building a mosque. The JC wrongly ruled that there was no change in the purpose for which the land was acquired (see paras 39–40).

(6) It was not open to the respondents to freely ignore the existence of the appellant's legitimate expectation that the respondents would act in accordance with the discretionary powers or duties lawfully conferred upon them by acquiring only what was needed and not more than what was needed. It was incredulous and bordering on the perverse to compulsorily acquire the entire 26 acres of the appellant's land for the purpose of building a mosque, even if that exercise included erecting other buildings normally associated with a mosque (see para 41).

(7) The circumstances of each case would determine when a decision was first communicated to the affected landowner. In the instant case, the court agreed with the appellant that it ought to be when Form H was served on the appellant. The spirit and intendment of art 13 of the Federal Constitution ought not to be rendered illusory and devoid of any real substance. The appellant was therefore within time when it filed the leave application. In any event, the appellant had applied for an extension of time if there was any delay on its part and that application was granted by the High Court after hearing lengthy arguments from the parties. The court exercised its discretion to extend time and granted the leave applied for. The respondents did not lodge any appeal against the order to extend time and grant the leave nor was a cross-appeal on that issue filed. If aggrieved by that decision, the respondents concerned should have filed a separate notice of appeal to ventilate the leave issue and not collaterally attack it by merely raising it as a point during the tail end of submissions in the course of the hearing of the instant appeal which had nothing to do with the leave issue (see para 46).

[Bahasa Malaysia summary

Perayu memiliki 26-ekar bidang tanah ('tanah') di mana di atasnya ia berniat untuk membangunkan estet perumahan. Ia mengetepikan lebih kurang seekar tanah untuk perluasan sebuah masjid sedia ada di tapak dan membuat peruntukan untuk lebih tanah untuk digunakan untuk tujuan itu sekiranya diperlukan. Responden, walau bagaimanapun, mengambil langkah untuk mengambil tanah secara paksa terhadap keseluruhan 26 ekar tanah di bawah Akta Pengambilan Tanah 1960 ('APT') untuk tujuan yang dideklarasikan seperti yang diterbitkan di *warta* kerajaan pembinaan sebuah masjid. Perayu memperolehi kebenaran daripada Mahkamah Tinggi untuk memohon semakan kehakiman bagi satu perintah untuk membatalkan keputusan pengambilan tanah, menghujahkan bahawa keseluruhan pelaksanaan pengambilan adalah salah secara prosedur dan tidak sah di sisi undang-undang. Perayu mengemukakan bahawa responden telah tidak mematuhi peruntukan mandatori APT berkaitan dengan pengeluaran Borang A dan K; bahawa terdapat perubahan dalam niat untuk apa tanah itu diambil kerana berbeza daripada apa yang dideklarasikan dalam notis dan bahawa keseluruhan proses permerolehan adalah mala fide dan melanggar jangkaan sah perayu bahawa responden akan bertindak sesuai dengan kuasa atau kewajipan budi bicara yang diberikan secara sah kepada mereka. Berkenaan dengan notis awal perolehan dalam Borang A yang mandatori diperlukan oleh s 4(1) APT yang akan diterbitkan dalam *warta* kerajaan, perayu menyatakan bahawa Borang A tidak pernah dikeluarkan oleh responden yang berkenaan, apalagi diterbitkan dalam *warta*. Berhubung dengan Borang K, perayu mengemukakan bahawa pengeluaran Borang K sahaja tanpa pengesahan yang diperlukan bagi peringatan pengambilan dokumen hakmilik kepada tanah tersebut di bawah ss 23 dan 66 APT adalah tidak mencukupi untuk meletakhak tanah pada pihak

berkuasa negeri dan oleh itu tanah itu tetap didaftarkan atas nama pemilik tanah itu. Mahkamah Tinggi menolak permohonan semakan kehakiman yang mengakibatkan rayuan terhadap keputusan itu. Semasa pendengaran rayuan, responden yang diwakili oleh Penasihat Undang-Undang Selangor menyemak semula hujahan yang dibuat mereka di hadapan Mahkamah Tinggi yang memohon untuk memfailkan permohonan semakan kehakiman tidak seharusnya diberikan kerana permohonan itu difailkan di luar masa.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Perayu telah menunjukkan bahawa ini adalah kes yang sesuai dan wajar untuk mahkamah rayuan membetulkan apa yang telah dibuktikan kesalahan besar yang berlaku kepada perayu. Pesuruhjaya kehakiman ('PK') telah gagal untuk menilai secukupnya keterangan di hadapannya yang telah menyebabkannya membuat keputusan yang salah. Beliau telah gagal menilai implikasi sebenar Borang A dan K APT dan juga isu-isu lain yang ditimbulkan oleh perayu (lihat perenggan 45).

(2) Pengeluaran Borang A adalah kehendak mandatori di bawah s 4(1) APT. Ia boleh dikeluarkan pada tarikh lain, tetapi ia hendaklah dikeluarkan dalam pengambilan tanah yang dilaksanakan di bawah APT. Bertentangan dengan keterangan di hadapannya, PK membuat dapatan bahawa kedua-dua Borang A dan D telah dikeluarkan dan diterbitkan dalam *warta* kerajaan apabila, sebenarnya, Borang A tidak pernah dikeluarkan langsung dan ini diakui oleh responden kedua dalam afidavitnya. Oleh kerana Borang A telah diakui tidak dikeluarkan kepada perayu, ia tidak mungkin boleh dan secara fakta telah diterbitkan seperti yang dikehendaki oleh *warta* kerajaan. Responden tidak dapat mengemukakan Borang A yang relevan walaupun dicabar oleh perayu. Oleh kerana tiada pengeluaran Borang A langsung dan maka tiada pengeluaran yang sama di dalam *warta*, terdapat ketidakpatuhan dengan kehendak mandatori undang-undang oleh responden, yang menjadikan permerolehan tanah perayu menyalahi undang-undang (lihat perenggan 14, 16 & 20).

(3) Mahkamah bersetuju dengan hujahan perayu bahawa pengeluaran Borang K semata-mata tanpa sokongan yang diperlukan peringatan pengambilalihan ke atas dokumen hakmilik menurut ss 23 dan 66 APT tidak mencukupi untuk meletak hak tanah pada pihak berkuasa negeri. Bergantung kepada keputusan Mahkamah Rayuan dalam kes *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 PK berpendapat bahawa tanah terletak hak pada pihak berkuasa negeri semasa Borang K dikeluarkan. Mahkamah ini tidak dapat mengikut keputusan dalam kes *Ishmael Lim* kerana panel dalam kes itu tidak mempertimbangkan dua peruntukan statutori asal

yang penting apabila membuat keputusannya, iaitu: (a) Surat Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 27/2009 (Surat Pekeliling 27/2009); dan (b) s 66 APT. Seksyen 66 secara mandatori mengkehendaki peringatan hendaklah dibuat untuk meletak hak tanah yang tertakluk kepada pihak berkuasa negeri, manakala Pekeliling 27/2009, dikeluarkan kerana melaksanakan peruntukan statutori s 8(e) Kanun Tanah Negara untuk memberi kesan kepada s 66 APT, bukanlah semata-mata pekeliling pentadbiran tetapi undang-undang subsidiari seperti yang ditafsirkan oleh s 3 Akta Pentafsiran 1948. Pekeliling mengesahkan semula kedudukan sebelum pengesahan atau peringatan pengambilan berikutan Borang K telah dibuat pada dokumen hakmilik tanah yang akan diperolehi, tanah itu tidak akan terletakhak kepada pihak berkuasa negeri. Kesan bersih kegagalan untuk mematuhi semua keperluan undang-undang dalam kes ini adalah bahawa tanah itu tidak terletak hak pada pihak berkuasa negeri dan perayu masih kompeten untuk mempertaruhkan dan meneruskan cabaran terhadap pengambilan yang dikatakan pada tanah (lihat perenggan 22, 25 & 35).

(4) Afidavit jawapan responden-responden kepada dakwaan yang dibuat oleh perayu dalam afidavitnya adalah daripada gabungan aneh penafian kosong, percanggahan diri mereka sendiri dan antara satu sama lain, menyalahkan antara satu sama lain atau hanya kegagalan dan/atau hanya keengganan secara terang-terangan untuk menjawab perkara yang dibangkitkan. Tingkah laku mengelak yang disengajakan oleh pihak responden-responden kerana gagal untuk menjawab dengan berterus terang dalam melaksanakan tugas awam mereka membentuk mala fide dalam erti kata ia dilakukan bagi menafikan perayu harta yang sah dan itu adalah alasan untuk membatalkan keputusan di bawah kategori luas prosedur tidak wajar (lihat perenggan 38).

(5) Responden-responden mengakui dalam afidavit mereka keperluan pengambilan seperti yang diiklankan dalam papan tanda yang didirikan di tapak adalah berlainan dengan yang dideklarasikan di *warta* kerajaan. Mereka selanjutnya mengakui bahawa tujuan deklarasi dalam *warta* adalah berlainan daripada tujuan penggunaan yang mana termasuk perkuburan dan lain-lain bangunan, yang mana tidak dideklarasikan dengan betul dalam *warta* kerajaan. Mahkamah bersetuju dengan perayu bahawa terdapat perubahan dalam tujuan yang mana tanah itu diambil alih dan ia bukanlah secara khas hanya bertujuan untuk membina masjid. PK telah salah memutuskan bahawa tiada perubahan dalam tujuan untuk tanah itu diambil alih (lihat perenggan 39–40).

(6) Ia tidak dibuka kepada responden untuk bebas mengabaikan kewujudan jangkaan sah perayu bahawa responden akan bertindak mengikut kuasa budi bicara atau kewajipan yang diberikan secara sah kepada mereka dengan memperoleh hanya apa yang diperlukan dan tidak lebih daripada

apa yang diperlukan. Ia tidak masuk akal dan bersempadan dengan orang yang tidak sengaja untuk mengambil keseluruhan 26 ekar tanah perayu untuk tujuan membina sebuah masjid, walaupun pelaksanaan itu termasuk mendirikan bangunan lain yang biasanya dikaitkan dengan sebuah masjid (lihat perenggan 41).

(7) Keadaan setiap kes akan ditentukan apabila keputusan disampaikan terlebih dahulu kepada pemilik tanah yang terjejas. Dalam kes ini, mahkamah bersetuju dengan perayu bahawa ia sepatutnya berlaku apabila Borang H diserahkan kepada perayu. Semangat dan keinginan perkara 13 Perlembagaan Persekutuan sepatutnya tidak diberikan ilusi dan tidak ada bahan sebenar. Oleh itu, perayu adalah dalam masa apabila ia memfailkan permohonan itu. Walau apa pun, perayu telah memohon untuk lanjutan masa jika terdapat apa-apa kelewatan di pihaknya dan permohonan itu telah diberikan oleh Mahkamah Tinggi selepas mendengar hujah-hujah yang panjang dari pihak-pihak. Mahkamah menjalankan budi bicaranya untuk melanjutkan masa dan membenarkan permohonan yang dipohon. Responden-responden tidak membuat apa-apa rayuan terhadap perintah untuk melanjutkan masa dan memberikan kebenaran dan tidak pula terdapat rayuan balas mengenai isu itu difailkan. Sekiranya terkilan dengan keputusan itu, responden-responden yang berkenaan seharusnya memfailkan notis rayuan berasingan untuk membicarakan isu permohonan dan tidak menyerang secara agresif dengan hanya membangkitkannya sebagai hujahan semasa akhir penyerahan dalam proses pendengaran rayuan ini yang mana tidak ada kaitan dengan isu permohonan itu (lihat perenggan 46).]

Notes

For cases on acquisition of land in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2254–2577.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704; [2008] 6 CLJ 805, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6, HL (refd)

Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192; [2011] 1 CLJ 285, CA (refd)

Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126; [2014] 7 CLJ 882, CA (not folld)

Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors [2016] 5 MLJ 557; [2016] 8 CLJ 149, FC (refd)
Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor [2016] 1 MLJ 544; [2015] 3 CLJ 861, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)
Morelle Ltd v Wakeling [1955] 1 All ER 708; [1955] 2 QB 379, CA (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Pentadbir Tanah Alor Gajah & Anor v Ee Chong Pang & Ors Civil Appeal 01(f)-13–06 of 2012(M) (unreported), FC (refd)
Ravindran v Malaysian Examinations Council [1984] 1 MLJ 168; [1984] 1 CLJ 232, FC (refd)
Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore [1979] 1 MLJ 49, PC (refd)

Legislation referred to

Federal Constitution art 13
Interpretation Acts 1948 and 1967 s 3
Land Acquisition Act 1960 ss 4(1), 23, 66, Forms A, D, H, K
National Land Code s 8(e)
Rules of Court 2012 O 53
Rules of the Court of Appeal 1994

Appeal from: Application For Judicial Review No 25–38–04 of 2015 (High Court, Shah Alam)

Rosli bin Dahlan (Bahari Yeow and Ho Ai Ting with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Naziah Mokhtar (Assistant Legal Advisor, Selangor State Legal Advisor Office) for the first, second, third and sixth respondents.
Kama Azura Md Kamel (Siti Rahmah Kalil with her) (Aishah Kama & Sabri) for the fourth and fifth respondents.

Abang Iskandar JCA:

INTRODUCTION

[1] The salient facts of this case are as follows. The United Allied Empire Sdn Bhd ('the appellant') owned a 26-acre development project land ('the said land') and had voluntarily reserved a part of that said land measuring slightly less than an acre for the expansion of an existing mosque 'Masjid Ar-Ridwan' on the site.

[2] The said land had since become the subject of a land acquisition exercise by the Pengarah Tanah dan Galian Selangor ('the first respondent'), Pentadbir Tanah Daerah Kuala Selangor ('the second respondent'), Jabatan Agama Islam Selangor ('the third respondent'), Majlis Agama Islam Selangor ('the fourth respondent'), Lembaga Zakat Selangor ('the fifth respondent') and Kerajaan Negeri Selangor ('the sixth respondent') ('the respondents') under the Land Acquisition Act 1960 ('the LAA 1960'). The acquisition exercise had affected the entire area of the said land. The declared public purpose of the said acquisition is to build a 26-acre mosque as was declared in the government *gazette*, it was acquired for 'Tujuan Tapak Masjid Ar-Ridwan'.

[3] The appellant was aggrieved by the said acquisition exercise and it had therefore, on 22 April 2013, filed an application for leave for judicial review ('JR') of the decision to acquire the said land by the respondents, with a view to have it quashed by way of an order of certiorari.

[4] On 12 February 2014, the judicial commissioner ('JC') granted the appellant leave to commence JR and a stay of all further proceedings in the acquisition of the subject land pending the disposal of the substantive JR application.

[5] The learned JC of the High Court sitting at Shah Alam, having heard the application, had dismissed the same with costs. In essence, the impugned decision has been related to the alleged wrongful acquisition of the appellant's land. It was submitted by the learned counsel for the appellant that the learned JC had dismissed the application on the ground that the appellant had not made out a case for JR.

[6] Being further aggrieved by the dismissal of its application for JR, the appellant had filed the present appeal now before us.

THE APPEAL

[7] We heard this appeal over two days in 27 September 2016 and 24 November 2016. Having considered the able submissions of all learned counsel, we are of the view that this appeal ought to be allowed with costs. We proffer our reasons in allowing this appeal, as follows.

[8] But first, we set out the issues raised by the appellant:

(a) unsubstantiated findings, against contemporaneous evidence;

(b) Forms A, D and K issue, mandatory compliance required, and not conclusive vesting *respectively*;

(c) procedural impropriety;

(d) change in purpose of acquisition;

(e) legitimate expectation; and

(f) mala fide.

[9] We will deal with the issues listed as above in turns, but not necessarily in sequence. At times, we found them to be inter-related. It was clear to us that the challenge mounted by the appellant was, in the main, premised on the grounds of procedural impropriety and/or illegality, as having played a prominent role in shaping the impugned decision of the respondents. Central to this issue has been the appellant's contentions pertaining to lack of due compliance with the requirements of Form A and Form K under the LAA 1960 by the respondents.

[10] In our considered opinion, there had been a serious non-compliance by the respondents in the failure to issue and serve Form A on the appellant. Form A is a statutory form that is required to be issued under s 4(1) of the LAA 1960. We reproduce the provisions under s 4(1) of the LAA 1960 as follows:

> 4 Preliminary notice
>
> (1) Whenever the state authority is satisfied that any land in any locality in the State is likely to be needed for any of the purposes referred to in section 3 a notification in Form A *shall* be published in the *Gazette*. (Emphasis added.)

[11] Learned counsel submitted before us that the statutory provisions, as stipulated under s 4(1) of the LAA 1960 are mandatory requirements, as the words which were employed by Parliament were clearly meant to convey the intention, in that Form A must be issued by the respondents when undertaking a land acquisition exercised under the LAA 1960. In essence, learned counsel for the appellant argued that this misdirection on a material fact, leading to a totally wrong finding of fact pertaining to a material and mandatory legal requirement imposed on the respondent had amounted to a serious error of law on the part of the learned JC. It was submitted before us that the use by Parliament of the word 'shall' in the said subsection was not in vain. It was meant to drive home the mandatory act to issue the Form A which then must be *gazetted* in the government *gazette*.

[12] In response to this contention, the learned assistant legal advisor for the State Government of Selangor ('the ALA') submitted before us that there was no mandatory requirement on the part of the respondents to issue Form A despite the seemingly clear wordings expressed under s 4(1) of the LAA 1960. Learned ALA cited to us the decision in *Pentadbir Tanah Alor Gajah & Anor v Ee Chong Pang & Ors* Civil Appeal 01(f)-13–06 of 2012(M) (unreported), ('*Ee*

Chong Pang's case'), a Federal Court case which had purportedly ruled that Form A under s 4(1) was *not* a mandatory requirement that must be issued in a land acquisition case under the LAA 1960.

[13] We had occasion to peruse that apex court's order as provided to us by learned ALA during submissions. With respect, we were mindful that the issue for decision by the apex court there was *whether Form A must be issued first before Form D is issued in a land acquisition exercise.* The learned apex court justices had answered that question in the *negative* (see Tab 2 in bundle of authority of the first, second, third, and sixth respondents).

[14] Now, directly related and relevant to this issue had been the following factual circumstance. It did not escape our notice that the learned JC had made a finding to the effect that both Forms A and D were issued and were duly published in the government *gazette*, when in fact, Form A was not issued at all. The latter stated fact was admitted to by Penolong Pentadbir Tanah Daerah Kuala Selangor in his affidavit that can be found at p 264 common core bundle Vol 1 para 25 therein. As Form A was admittedly not issued to the appellant, it could not possibly and factually be published as required, in the government *gazette*. It was also in evidence that the respondents had failed to produce the relevant Form A despite being challenged to do so by the appellant.

[15] As such, the answer given by the apex court, which was in the negative in the *Ee Chong Pang*'s case, with respect, did not appear to fully cover the instant situation which obtained before us, namely, where there was a clear admission by Penolong Pentadbir Tanah Daerah Kuala Selangor that Form A was never issued at all. It is our respectful view that the answer handed down by the apex court in *Ee Chong Pang*'s case does not extent as far as to negate completely what is clearly intended by Parliament that has found expression in s 4(1) of the LAA 1960. As such, we are of the view that *Ee Chong Pang*'s case does not advance the respondents' professed contention any much further. That decision by the apex court must therefore, be viewed and understood in its proper context, namely Form D may be issued before Form A was issued, but it did not go to the extent that Form A needed not be issued at all.

[16] In other words, we were of the view that Form A was still a mandatory requirement pursuant to s 4(1) of the LAA 1960. It may be issued at a later date, but, it must be issued in a land acquisition exercise under the LAA 1960. As there was admittedly no such issuance at all of Form A and therefore no publication of the same in the government *gazette*, there had been a non-compliance of a legal requirement by the respondents. There was therefore, an omission to comply with a mandatory legal dictate, thereby amounting to an illegality.

[17] The law on JR is rather trite. Case law authorities have developed, by leaps and bounds, in this important area in the public law sphere. It is now beyond dispute that a decision made in exercise of public duty or function is susceptible to be quashed on recognised grounds by way of a JR application, as enunciated by Lord Diplock in the celebrated House of Lords decision in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 ('the *CCSU*'s case'). The learned Law Lord had opined as follows:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community ...

[18] The ground of challenge premised on 'illegality' would encompass the complaints challenging the legality of the decision-maker's decision. In the *CCSU* case, Lord Diplock had confirmed that:

> ... by illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question.

[19] In the context of the appeal before us, the respondents had been shown to have failed to understand correctly the law which had regulated their decision-making process. In relation to the legal requirement to issue Form A as spelt out under s 4(1) of the LAA 1960, no such Form A was ever issued. That was an admitted fact established in the relevant affidavit. A fact which the learned JC had obviously not directed her mind to. Rather, she had made two crucial findings of fact to the effect that Form A was not only issued but that it was also published in the government *gazette*. Suffice to say that those findings were contrary to the evidence before her. As such, we agreed with learned counsel for the appellant that the learned JC had failed to address her mind correctly to a material fact pertaining to the non-issuance of Form A as required under the LAA 1960.

[20] However, that having been said, the factual circumstance that matters in this JR application remained the fact that no Form A was ever issued, let alone *gazetted*, as was admitted as that pointed to the allegation that the acquisition of the appellant's land was done not in accordance with the law, or put simply, it was acquired illegally by the respondents. That misdirection had seriously compromised the learned JC's decision in that she had failed to see

failure on the part of the respondents to comply with a mandatory requirement under s 4(1) of the LAA 1960.

[21] The acquisition was therefore done *not* in compliance with the imperative dictates of the statutory provision in s 4(1) of the LAA 1960. There was established by the appellant that there was a failure to follow the correct lawful procedure and that there was illegality committed by the respondents in the course of compulsorily acquiring the subject land belonging to the appellant in this case. Premised on the above, we were in agreement with learned counsel for the appellant that a grave non-compliance of s 4(1) of the LAA 1960 had been committed by the respondents.

[22] As regards the issue on Form K, we were also in agreement with the appellant's contention that such mere issuance of Form K, without the required endorsement of the memorial under ss 23 and 66 of the LAA 1960, would not be sufficient, in order to effectively or conclusively vest the title of the said land to the state authority. The position that was taken by the learned JC had been that the title of the acquired land would vest in the state authority the moment the Form K was issued. She had relied on the decision of this court in the case of *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126; [2014] 7 CLJ 882 ('the *Ishmael Lim* case') to support that proposition.

[23] We had occasion to peruse the decision of this court in the *Ishmael Lim* case. Clearly, the factual matrix in that case is rather different to the one obtaining in this appeal presently before us. In fact, although the panel of this court was faced with the issue of Form K, the panel there was not entirely appraised with the materials that would, if placed before the panel in the *Ishmael Lim* case, might lead the panel there to come to a different decision.

[24] In this case before us, the question that needed to be answered in context, has been 'when and how do the Subject land vest in the state authority as State land and whether the land owner can still seek a declaration and certiorari to quash the acquisition for so long as there is no endorsement/memorial on the title to vest land in the State'. This court in the *Ishmael Lim* case had not considered the clear wordings of s 66 of the LAA 1960 which language suggests that it is a mandatory requirement for a memorial to be made, in order to vest the title in the subject land to the state authority. We reproduce the relevant portion of the judgment of this court in the *Ishmael Lim* case, as follows:

> Upon the issuance of Borang K in 1974, the land had been vested in the state authority notwithstanding that there was an omission to endorse the memorial on the title, which was a requirement under s 23 of the Act. The requirement for an endorsement of the memorial was a formality and the omission to do so did not

invalidate the acquisition process. As such, the purported transfer of the land in 1975 to the appellant's father and in 1992 to the appellant was void and ineffective. The acquisition process had ended in 1974 (para 39).

[25] We noted, with respect, that the panel of this court in the *Ishmael Lim* case did not refer to s 66 of the LAA 1960. Section 66 provides for the vesting of the title in the said land to the state authority thereby effectively reverting the acquired land as state land. It was noted too by us that this court in the *Ishmael Lim* case did not consider the Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 27/2009 which reaffirms effectively the position that *before* an endorsement or memorial of Form K is made on the issue document of title of the land, no title shall be vested in the state authority in respect to the said acquired land. We noted that the said circular was issued by the Director General of Lands and Mines with the consent of all State Directors, and that of the Attorney-General's Chambers, to that effect, which was in consonance with the wordings of s 66 of the LAA 1960. The said circular was also issued in exercise of the statutory provisions of s 8(e) of the National Land Code ('the NLC') and as such, it had *not* been merely a circular that was issued in exercise of the purely administrative power of the Ketua Pengarah Tanah dan Galian Persekutuan or the Director General of Lands and Mines. On the contrary, it was clearly issued under statutory provisions of the NLC, in order to give effect to the legal dictates, as contained in s 66 of the LAA 1960. The circular is indeed a subsidiary legislation as defined by s 3 of the Interpretation Acts 1948 and 1967. We were quite surprised that the respondents had taken a position that was in direct contradiction to that which had been its very own professed internal directive on this matter, which as was indicated by the ALA has not been expressly revoked. We now reproduce the said circular, as follows:

Pekeliling Ketua Pengarah Tanah Dan Galian Persekutuan Bilangan 27/2009

Mengambil Milik (Taking Possession) Seksyen 18 dan Mengambil Milik Secara Rasmi (Taking Formal Possession) Seksyen 22, Akta Pengambilan Tanah 1960 Pekeliling ini dikeluarkan untuk memaklumkan kepada Pentadbir Tanah bila mengambil milik tanah (taking possession of land) menurut seksyen 18, Akta Pengambilan Tanah 1960 (selepas ini disebut sebagai 'APT') boleh dibuat dan cara melaksanakannya. Pengeluaran Borang K disebut dalam APT sebagai mengambil milik/taking possession (seksyen 18) dan penyampaian Borang K kepada penduduk/penampalan Borang K di atas tanah dipanggil sebagai mengambil milik secara rasmi/taking formal possession (subseksyen 22(1)).

2. APT tidak menetapkan tempoh masa pengeluaran Borang K oleh Pentadbir Tanah. Namun demikian seksyen 18 APT, memperuntukkan supaya boleh dikeluarkan dalam dua keadaan berikut:–

2.1. mengambil milik mana-mana tanah dengan mengeluarkan Borang K pada waktu penyampaian Notis Borang H kepada penduduk tanah di bawah subseksyen 16(1) atau pada suatu masa selepas itu; atau

2.2. mengambil milik dengan mengeluarkan Borang K bagi mana-mana tanah yang dinyatakan dalam Sijil Perakuan Segera (Borang I) sama ada telah dibuat award atau belum (pengambilan milik dengan mengeluarkan Borang K bagi tanah yang ada bangunan hendaklah dibuat mengikut seksyen 20).

3. Mengambil milik dengan mengeluarkan Borang K tidak boleh dibuat selagi penyampaian Notis Borang H kepada penduduk tanah di bawah seksyen 16(1) tidak dilakukan atau tidak menerima arahan daripada Pengarah Negeri melalui Borang I. Bagi tanah yang ada bangunan, Borang K boleh dikeluarkan setelah peruntukan di bawah seksyen K hendaklah sama dengan tarikh penyampaian Borang H kepada orang menduduki tanah atau tarikh terkemudian daripadanya. Pada kelazimannya, tarikh Borang K ialah satu tarikh selepas pembayaran dibuat. Tujuannya untuk mengelak daripada caj bayaran lewat.

5. Mengambil milik dengan mengeluarkan Borang K, orang atau perbadanan yang bagi pihaknya tanah itu diambil masih tidak boleh memasuki tanah yang dikatakan telah diambil milik itu. Mengambil milik melalui kuat kuasa seksyen 18(a) atau (b) tidak memadai untuk membolehkan orang atau perbadanan memasuki tanah kerana tanah itu masih merupakan tanah milik dan kepunyaan tuan punya tanah. Memasuki secara fizikal boleh dianggap sebagai satu pencerobohan.

6. Borang K yang telah dikeluarkan hendaklah diserah kepada penduduk/ orang yang mendiami di atas tanah atau jika penduduk tidak dapat ditemui, dengan menampalkan Borang K di atas tanah itu (subseksyen 22(1)) mengambil milik secara rasmi (take formal possession) terlaksana dan memberi kesan seperti berikut:–

6.1. pihak berkuasa yang mengambil tanah itu berhak kepada hasil keluaran;

6.2. pihak berkuasa yang mengambil tanah itu berhak untuk menduduki dan menggunakannya sebagaimana maksud pengambilan itu dibuat atau lain-lain maksud berlainan daripada maksud asal pengambilan;

6.3. penarikan balik pengambilan mengikut subseksyen 35(1) APT 1960 tidak boleh dibuat;

6.4. bermulanya tarikh genap masa (due date);

6.5. jika tanah itu diambil untuk kerajaan Persekutuan, kerajaan Negeri tidak boleh mengeluarkan apa-apa permit seperti Permit mengeluarkan Bahan Batuan atau lesen seperti Lesen Menduduki Sementara.

7. Justeru mengambil milik secara rasmi (take formal possession) adalah terlaksana mulai dari tarikh atau setelah Borang K itu dibuat memorial atau endorsan di dalam dokumen hakmilik daftar adalah tidak tepat; atau mengandaikan bahawa tindakan mengambil milik secara rasmi (take formal possession) terlaksana hanya dengan menyampaikan notis Borang K kepada tuan tanah atau pemilik berdaftar adalah salah. Mengambil milik secara rasmi (take formal possession) tidak memerlukan Pentadbir Tanah pergi ke atas tanah dan mengisytiharkan bahawa tanah tersebut

telah di ambil milik secara rasmi (take formal possession).

8. Borang K yang telah dikeluarkan hendaklah juga diserahkan kepada pihak berkuasa pendaftaran (seksyen 22(b)) yang berkenaan. *Pihak berkuasa pendaftaran berkenaan apabila menerima notis Borang K, atau Pentadbir Tanah setelah melengkapkan Borang K, hendaklah membuat memorial atau endorsan dalam dokumen hak milik daftar atau lain-lain rekod yang sesuai menyatakan bahawa sama ada kesemua tanah itu atau sebahagian daripada tanah itu telah diambil dan menjadi hak Pihak Berkuasa Negeri. Memorial atau endorsan ini adalah sangat mustahak kerana selagi ianya belum dibuat, tanah itu masih dimiliki oleh tuan punya.*

Antara bentuk ayat endorsan adalah seperti berikut:–

'Mengambil milik secara rasmi ..... Jilid No. ..... Folio No. .....Kesemua tanah ini telah diambil balik dan terletakhak pada Pihak Berkuasa Negeri sebagai tanah Kerajaan bebas daripada bebanan seperti yang dimaksudkan oleh seksyen 66 Akta Pengambilan Tanah 1960 pada ..... hb.

..... 20.....

Tarikh: .....

.....

Pendaftar/Pentadbir Tanah'

ATAU

'Mengambil milik secara rasmi ..... Jilid No. ..... Folio No. ..... Seluas ..... daripada tanah ini telah diambil balik dan terletakhak pada Pihak Berkuasa Negeri sebagai tanah Kerajaan bebas daripada bebanan seperti yang dimaksudkan oleh seksyen 66 Akta Pengambilan Tanah 1960 pada ..... hb 20.....

Tarikh: .....

.....

Pendaftar/Pentadbir Tanah'

9. Pekeliling ini dikeluarkan dengan persetujuan semua Pengarah Tanah dan Galian Negeri dan Jabatan Peguam Negara dan berkuat kuasa mulai tarikh dikeluarkan. Dengan kuat kuasa pekeliling ini, maka Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 32/1977 dibatalkan.

tt

(DATO' ABD HALIM BIN AIN)

Ketua Pengarah Tanah dan Galian Persekutuan

No. Fail: JKPTG/101/KPU/779 Jld. 4

Tarikh: 31 Disember 2009

(Emphasis added.)

[26] In the course of oral submissions before us, learned ALA had sought to tender a *new* document (see Tab 1 of bundle of authority of the first, second, third, and sixth respondents) which appeared to exhibit to this court that an endorsement/memorial was indeed made on the IDT of the said land of the appellant. This new document, being in the nature of fresh evidence was not admitted by way of a proper motion to adduce fresh evidence under the Rules of the Court of Appeal 1994. As such, it was not to be considered by this court. Even if it was to be considered at all, little or no weight ought to be given to it because, as submitted by learned counsel for the appellant, and which was not rebutted by the learned ALA, there was no attempt made by the respondents at the High Court proceedings to produce such a document, despite being challenged by the appellant to do so. So, for the ALA to produce such a document before us for our consideration at the eleventh hour, had indeed invited great suspicion rather than extending the intended comfort, in so far as the bona fides of such a move on the part of the respondents was concerned. Instead of having the effect of clearing the air on the issue pertaining to the endorsement of Form K, it had the opposite effect of further clouding the already existing murky atmosphere that was pervading the impugned land acquisition exercise.

[27] As such, the question of this court being bound by or departing from the decision of its earlier panel in the *Ishmael Lim* case does not, with respect arise. The rule on the applicable principle of binding precedents as far as the Court of Appeal is concerned has been a matter of quite lucid discussion by learned Justice Peh Swee Chin FCJ in the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645. Suffice for us to state here that one of the recognised heads under which a Court of Appeal panel may not follow a decision of an earlier panel is where the latter decision was given per incuriam. As was defined by Sir Raymond Evershed MR in *Morelle Ltd v Wakeling* [1955] 1 All ER 708; [1955] 2 QBD 379 at p 406, that term must be given a narrow meaning. He went on to say that 'per incuriam' meant:

> a decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong.

[28] Applying that statement of the law on what is meant by *per incuriam,* by Sir Raymond Evershed MR to the factual matrix of the case before us, it was clear to us that in the course of coming to its decision, this court in the *Ishmael Lim* case did not have the distinct benefit of the opportunity to consider two crucial provisions with statutory origin, namely: (1) the Circular 27/2009; and (2) s 66 of the LAA 1960. With respect, in the circumstances, it would not be disrespectful for this panel to differ from the decision in the *Ishmael Lim* case. Indeed, in the context of the present appeal before us, our decision is different

from the panel in the *Ishmael Lim* case in respect of the effect of the issue of Form K of LAA 1960 because that panel, with respect, was not appraised of s 66 of the LAA 1960 and the Circular 27/2009 in its deliberation.

[29] In the Court of Appeal case of *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192; [2011] 1 CLJ 285 the panel there said in para 79 therein, as follows:

> Likewise, this specific issue was not placed before the Court of Appeal for the court's consideration.

[30] It concluded by stating at para 80 therein, as follows:

> Hence, with respect, I do not propose to follow the Court of Appeal's decision in *UNP Plywood*. In *Young v Bristol Aeroplane Company, Limited* [1944] KB 718 it was held that a Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, eg, where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court. This principle was cited with approval by our Supreme Court in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ 219; [1988] 1 CLJ Rep 63.

[31] By way of reiteration, the panel of this court in the *Ishmael Lim* case did not have before it, the issues pertaining to the true import of s 66 of the LAA 1960 and of Circular 27/2009. As such, with respect, we had decided not to follow this court's decision in the *Ishmael Lim* case.

[32] According to the Circular No 27/2009, it was stated in the clearest of terms: 'Pihak berkuasa pendaftaran berkenaan apabila menerima notis Borang K, atau Pentadbir Tanah setelah melengkapkan Borang K, hendaklah membuat memorial atau endorsan dalam dokumen hak milik daftar atau lain-lain rekod yang sesuai menyatakan bahawa sama ada kesemua tanah itu atau sebahagian daripda tanah itu telah diambil dan menjadi hak Pihak Berkuasa Negeri. *Memorial atau endorsan ini adalah sangat mustahak kerana selagi ianya belum dibuat, tanah itu masih dimiliki oleh tuan punya.* (Emphasis added.)

[33] We reproduce ss 23 and 66 of the LAA 1960 for ease of reference:

> 23 Entry in register
>
> The proper registering authority, upon receipt of the notice in Form K, or the Land Administrator of his own motion after completing Form K, *shall*, upon the register document of title or other appropriate record in his possession as specified in subsection 9(2) or (3), make with respect to any scheduled land a memorial —

A (a) that the whole of such land has been acquired and has vested in the state authority or, in the case of a parcel of a subdivided building, in the person or corporation on whose behalf the parcel has been acquired; or

(b) that so much of the land as is specified in the last column of the schedule to such Form has been acquired.

B 66 Land to vest free from incumbrances

Upon the making of a memorial under section 23 in respect of any scheduled land, the land *shall* vest in the state authority as State land or, in the case of a parcel of a subdivided building, in the person or corporation on whose behalf the parcel was acquired, free from incumbrances. (Emphasis added.)

C

[34] Reading these statutory provisions as contained in ss 23 and 66 of the LAA 1960, we were of the view that they are express directions by the legislature which compliance must be taken as being of a mandatory nature. D The word 'shall' that was used in both sections connotes the mandatory nature of the legislative intent. As such, it was our considered view that the cumulative effect of these two sections above — quoted read with the Circular No 27/2009 has been that the endorsement of the memorial on the issue of Form K on the IDT of the acquired land is mandatory and that only upon such positive act E having been done, shall the title of the said land 'vest in the state authority as state land'. Absent that, as was recognised by the very document emanating from the Director General of Land and Mines via Circular No 27/2009, 'Memorial atau endorsan ini adalah sangat mustahak kerana selagi ianya belum dibuat, tanah itu masih dimiliki oleh tuan punya'.

F

[35] As was alluded to by us in the previous paragraphs above, we found it rather strange that the respondents had not acted according to their own standard operating procedure as per the Circular No 27/2009 which had been issued under statutory provisions with approval of the Attorney General's G Chambers. Be that as it may, the effect of that failure to comply with ss 23 and 66 of the LAA 1960 and the Circular No 27/2009 must suffer the consequences. It is this. To our minds, the nett effect of this failure to observe the statutory requirements of ss 23 and 66 of the LAA 1960 and of its own Circular 27/2009 must necessarily be that the said land has not vested in the H state authority although Form K may have been issued and *gazetted*. As such, the appellant was still competent to stake and pursue its challenge against the purported acquisition of said land. This scenario had revealed an instance of the decision-maker not comprehending the exercise of legal power that it was performing, to wit, the express statutory provisions under the LAA 1960. And I that is a recognised head for quashing such a decision by way of JR. Form K may well be the last form to be issued in an acquisition exercise, but unless and until there was an endorsement as envisaged under ss 23 and 66 of the LAA 1960, the subject land under acquisition would still belong to the land owner, not the state authority, as it would not have become a state land.

THE REMAINING ISSUES

[36] The remaining issues that were raised by the appellant had been grounded upon grounds of legitimate expectation, mala fide and a change in the public purpose of the acquisition.

[37] Good faith or bona fide, presupposes the complete absence of mala fide, which incidentally, is the direct anti-thesis of what good faith is. Mala fide equals bad faith. A decision that is driven by mala fide is a tainted decision and could not, and ought not to be allowed to stand by a court of law (see generally the Privy Council decision in the case of *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore* [1979] 1 MLJ 49 for the proposition that the declared purpose may be struck down as null and void if it could be proven that it was in fact, actuated by bad faith).

[38] In the context of this appeal before us, the respondents' affidavit in response to the assertions made by the appellant in its affidavit, was a curious mix of bare denials, contradictions of themselves and each other, blaming each other or just plain outright failure and/or refusal to answer the points raised. The intentional evasive conduct on the part of the respondents in failing to answer with the required candour in the performance of their public duty, to our minds, constitute mala fide, in the sense that it was done so as to deny the appellant what was its rightful property. Indeed, an intentional or malicious refusal to perform some duty properly and reasonably, so as to deny another person of his right, is but an unmistakable façade of mala fide. Mala fide as a ground to strike down a decision comes under the broad category of procedural impropriety in the sense that in the decision making process, the decision maker is actuated by less than proper considerations, in fact by less than honest considerations. In the circumstances, it was our considered view that the learned JC's findings that 'there are no procedural improprieties in the conduct of acquisition' of the said land were not founded on a sound basis and could not be sustained. Mala fide is also incongruous with the essence of natural justice which advocates fairness and fair play. As a ground of challenge against a decision of a decision-maker, it would, in our respectful view, fall squarely in the recognised head of procedural impropriety.

[39] It was also submitted before us that the respondents were evasive when confronted by the appellant as to the real reason for the acquisition. The respondents contradicted themselves respectively and also each other and finally admitted in their affidavits that the purpose of acquisition as adverted in the signboard erected on site is different from the declaration in the government *gazette*. In an attempt to justify the need for a 26-acre mosque, the respondents further admitted that the purpose declared in the government *gazette* is also different from the intended use which will include a cemetery and

other buildings, none of which were properly declared in the government *gazette*.

[40] It must be borne in mind always that the declared purpose for which the said land was to be acquired was for the public purpose of building a mosque. A mosque is a mosque which is essentially a building for the primary purpose of performing prayers by members of public. In fact, the appellant had provided for an area of nearly one acre to be set aside from the entire area of the said land for the purpose of building a mosque in the intended housing development. That area actually commensurate with the size allocated for a mosque in the vicinity of the Bukit Berjuntai, where the said land is situated. In fact, the appellant had also set aside another area of about 38,000 sqft for future expansion of the mosque. The respondents then averred that the said land was to be acquired for what would appear to be a mosque complex similar with training centre, cemetery and so forth so that the entire area of the said land amounting to about 26 acres was needed to be acquired. With respect, we agreed with learned counsel for the appellant that there was change for which the said land was to be acquired by the respondents, and it was not specifically only for the purpose of building a mosque. What the respondents had affirmed in their affidavits clearly depicted a wider and expansive purpose than what was declared in the government *gazette*. As such, it was erroneous on the part of the learned JC to have ruled that there was no change in the purpose for which the said land was to be acquired by the respondent.

[41] As regards legitimate expectation, in the circumstances obtaining in this case, we were in agreement with learned counsel for the appellant that it was not open for the respondents to freely ignore the existence of the appellant's legitimate expectation that the respondents would act in accordance with the discretionary powers or duties lawfully conferred upon them by acquiring what it is needed and *NOT* more than what it is needed. It would be incredulous and bordering on the perverse, to compulsorily acquire the entire land area belonging to the appellant of about 26 acres for the purpose of building a mosque, even if such exercise would include erecting buildings normally associated with a mosque.

[42] Now, it is trite that JR has been defined and accepted as a means by which the Judiciary exercises control over the Executive, in order to prevent abuse or illegal or improper exercise of power by the latter. In the celebrated case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, learned Justice Raja Azlan Shah AG Chief Justice Malaya (as His Majesty then was) had occasion to say that legal powers must have legal limits, for otherwise there would be dictatorship. Also, 'unfettered discretion is a contradiction in terms'.

[43] It would also be helpful to remind ourselves of what Lord Woolf Conyngham, the former Lord Chief Justice of England and Wales, had succinctly written, in his much-acclaimed work entitled *The Rule of Law* [2011] on the very exercise by a decision-maker of the statutory power that was conferred on him, as follows:

> First is the requirement that statutory powers should be exercised in good faith, that is, honestly. It is presumed that Parliament intends no less. It has been described that the first principle of judicial review is that a discretion must be exercised in good faith.

[44] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 at p 61; [1999] 3 CLJ 65 at p 119, Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court had occasion to say:

> ... people expect fairness in their dealings with those who make decisions affecting their interests.

OUR CONCLUSION

[45] Premised on the above considerations, we had agreed with the submissions of learned counsel for the appellant, En Rosli Dahlan that the learned JC had erred in coming to her decision in dismissing the application for JR of the land acquisition of the appellant's land. In the upshot, a case had been made out by the appellant's learned counsel that this is a fit and proper case whereby we ought to invoke our appellate power in order to right what had been proven to be a grave wrong occasioned to the appellant. The learned JC had failed to sufficiently appreciate the evidence led before her and that had led her to come to a plainly wrong decision. According to the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 such a situation warrants appellate intervention. We also find that the learned JC had erred in her appreciation pertaining to the true implications of Forms A and K of the LAA 1960 as well on the other issues raised by the appellant before us. We therefore set aside the decision of the learned JC. We allowed the appeal as prayed for in the appellant's JR application as the appellant had made out their complaints against the respondents in respect to their decision in compulsorily acquiring the said land.

[46] For completeness, it must be recalled that the learned ALA had submitted before us that leave ought not to be granted as the application was filed out of time. This issue was ventilated at some length in the High Court and at the end of the day, leave was granted to the appellant. The legal position that the time-line within which time an aggrieved land owner must file an application for leave under O 53 of the ROC 2012 to quash the adverse decision against him is of a mandatory nature is beyond dispute. Neither is the

consequence of failure to abide by such time-line a matter of potential contention. Its compliance is a fundamental requirement. For those propositions the cases of *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704; [2008] 6 CLJ 805 and *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168; [1984] 1 CLJ 232. That having been said, we were of the considered view that, premised on the apex court decision in the *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544; [2015] 3 CLJ 861 when a decision was first communicated to the affected landowner would depend on the circumstances of each case. In the context of this particular case, with respect we were in agreement with the learned counsel for the appellant that it ought to be when Form H was served on the appellant, bearing in mind this process is concerned with compulsory acquisition of the appellant's subject landed property. The spirit and intendment of art 13 of the Federal Constitution ought not to be rendered merely illusory devoid of any real substance. Departing, as it were, from that date therefore, the appellant was within time when he filed in the leave application. In any event, the appellant had applied for an extension of time, should there be any delay on its part. The learned High Court judge had granted his application after hearing what had been a lengthy argument by parties. He had exercised his discretion to extend time and granted the leave applied for by the appellant. No appeal was lodged against that order made in exercise of the learned High Court judge's discretion to extend time and thereby granting leave to the appellant, by the respondents, nor was a cross-appeal filed on that issue by the respondents. The apex court decision in the case of *Kabushiki Kaisha Ngu v Leisure Farm Corp Sdn Bhd & Ors* [2016] 5 MLJ 557; [2016] 8 CLJ 149 with respect, would apply in the circumstances, against the respondents. In the circumstances, it behoves or becomes necessary upon the respondents to file in a separate notice of appeal in order to ventilate the leave issue. No such step was taken by the respondents in this case. The issue of leave concerned the jurisdiction of the court. It was ventilated before the learned High Court judge who had decided for the appellant and granted it leave. If the respondent was aggrieved by that decision, they ought to have mounted a direct frontal attack against it by way of filing a notice of appeal and not by way of a collateral attack by merely raising it as a point during the tail end of her submission in the course of the hearing of the appellant's appeal, which had nothing to do with the leave issue.

[47] As indicated earlier, we allowed this appeal with costs. After hearing submissions on costs, we ordered respondent Nos 1, 2, 3 and 6 to pay costs of RM50,000 to the appellants here and below. As against respondent Nos 4 and 5, we ordered them to pay RM 50,000 to the appellant here and below. All costs are subject to payment of allocator fees. We order that the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Ashok Kumar